IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 636.

MURRAY WINTERS,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC.—*AMICUS CURIAE.*

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The Authors' League of America, Inc., files this brief by stipulation of the parties.

The Authors' League was organized in 1912. It is divided into Guilds: The Authors' Guild of approximately 1700 authors of books, stories, articles, etc.; The Dramatists' Guild of approximately 2500 playwrights; and the Radio Writers' Guild, which includes many leading writers of radio broadcasting programs, both dramatic and news. The Authors' League of America, Inc., has a total membership, exclusive of screen writers, of approximately 5363 writers.

The League is concerned in the proceeding taken here by the District Attorney which terminated in a conviction affirmed by the Appellate Division and the Court of Appeals of the State of New York (Judge Lehman, dissenting) under a statute which in our opinion is invalid as violative of constitutional rights and privileges. The Courts below seemed to recog-

nize the extreme to which the statute lends itself, but justified its affirmance of the conviction upon the belief that no District Attorney would really seek a prosecution except in flagrant cases.

This is a shadow under which our authors should not be asked to function. A law which makes it an offense to do that which the Constitution permits as of right is not to be tolerated; and it cannot be supported on the theory that the whim of no District Attorney will lead him to enforce it. True enough, the District Attorneys of our counties have never, in the sixty years of existence of the statute, found occasion to enforce the statute. This in itself is a measure of its invalidity, for reasons later shown.

It is clear that the "Obscenity Statute", Subdivision 1 of Section 1141, of the Penal Law, is a thing separate and apart from Subdivision 2, under which this conviction was had. Subdivision 2 makes it a misdemeanor for any person to publish, sell, lend or make a gift of, or have in his possession for such purpose any book or other printed paper "devoted to the publication, and principally made up of criminal news, public reports or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime * * *".

The statute forbids the publication of news of the day if it consists of criminal news, public reports or accounts of criminal deeds; and it forbids the publication and sale of so-called detective and Western stories if they relate to criminal deeds or stories of deeds of bloodshed or crime.

The Appellate Division said of this statute:

> "It is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a

manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts" (fol. 167).

Where is that stated in the statute? Where is there anything in the statute as to the manner in which the printed material is presented? Again it is said in the opinion that "the prosecution readily concedes" that the statute does not seek to suppress recognized literature including practically all detective and Western stories (fol. 167). Nothing of the sort appears in the statute, nor does the concession of the prosecuting attorney of one of our counties have any binding effect on anybody, including himself and his successor in office. Under the statute as written, no attorney may advise a client that he may safely proceed to write, edit, or publish, or sell, or lend, or give away any of the detective and Western stories and books if such book contains stories of deeds of bloodshed or crime. It would be no consolation that once a District Attorney in New York County said that the law does not mean what it says, and that such writings may be considered as free of the fear of prosecution.

POINT I.

The freedom of the press is restricted by the statute here invoked.

It may be conceded that many books and stories in violation of the statute have been written, published, loaned and given away without any prosecution or any threat of it, but that cannot constitute any reason

for the support of the statute if it is, on its face, unconstitutional.

Mr. Justice Murphy said, in *Thornhill* v. *State of Ala.*, 310 U. S. 88, at page 97:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U. S. 147, 162-165, 60 S. Ct. 146, 151-152, 84 L. Ed. 155; *Hague* v. *C. I. O.*, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; *Lovell* v. *Griffin*, 303 U. S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949."

and again:

> "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 630, 75 L. Ed. 1357. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

The Court further said that the existence of such a statute, which lends itself to harsh and discriminatory enforcement by local prosecuting officials, results in restraint on all freedom of discussion and might reasonably be regarded as within the purview of the statute.

Nor is it important in the consideration of the question here whether or not the books which were found in Mr. Winters' cellar were less than we like to consider as good literature to circulate among the public. If the books were obscene or otherwise within the condemnation of Subdivision 1 of the Section, prosecution should have been under that part of the statute. If the statute is invalid on its face it cannot be sustained despite its manifest abridgement of the freedom of speech upon the ground that the defendant is not entitled to sympathy. As was said in the *Thornhill* case, *supra*, page 98:

> "Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A. L. R. 1484; *Schneider* v. *State*, 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151, 84 L. Ed. 155. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888."

The Court below said:

> "That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted" (fol. 163).

Here, both the Court and the District Attorney fall into the error of adopting a long since abandoned doctrine. In 1868 in an English court, it was said:

> "An obscene book is one which has the tendency to deprave and corrupt those whose minds were open to immoral influence and into whose hands the publication might fall." *Regina* v. *Hicklin*, L. R. 3 Q. B. 360.

But an enlightened age pays a greater respect to the advancement of literature and subordinates the shielding of the moronic mind to the public good. Thus Judge Learned Hand in *United States* v. *Levine*, 83 Fed. 2nd 156, 157, said:

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and be delightful or enlightening. No civilized community not fanatically puritannical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. * * *"

This was spoken of matter claimed to be obscene, but clearly the doctrine could as well apply to material said to demoralize certain "impressionable readers".

In the opinion of the Appellate Division below *People* v. *Gitlow*, 234 N. Y. 132, was quoted from and reference was made to that portion of the opinion which held without the constitutional privileges, those who publish articles which tend to corrupt morals, induce crime, etc. The conviction in that case was of

the crime of criminal anarchy and not of the publication of stories of crime. There was forbidden the printing, publishing, etc., of printed matter advertising that organized government should be overthrown by force, violence or any unlawful means. Section 121 Penal Law.

In *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444, a city ordinance which prohibited distribution of literature within the city limits was held invalid because it included literature in the widest sense. That ordinance, as the statute here, might indeed have been used or overlooked by the authorities, as they may have judged any given bit of literature to be good or bad according to their own views. The Court said that legislation of the type of the ordinance would restore the system of license and censorship in its baldest form; something against which the struggle for the freedom of the press was primarily directed.

Bridges v. *California*, 314 U. S. 252, presents much that is helpful in the consideration of this act.

It is already established that before there can be denial of speech guaranteed in the First and Fourteenth Amendments of the Federal Constitution and Section 8 of Article I of the Constitution of the State of New York, there must appear to be a clear and present danger that the words which are to be prohibited will bring about the substantive evils that Congress (or the Legislature) has a right to prevent. *Schenck* v. *United States*, 297 U. S. 47.

In the *Bridges* case the Court said (p. 262) that the "clear and present danger" language of the *Schenck* case has afforded a practical guidance in a great variety of cases in which the scope of constitutional

protection of freedom of expression was an issue. It has been utilized in passing on the constitutionality of convictions under the Espionage Acts, *Schenck* v. *U. S., supra*; under a Criminal Syndicalism Act, *Whitney* v. *California*, 274 U. S. 357; under an Anti-Insurrection Act, *Herndon* v. *Lowry*, 301 U. S. 242; and for breach of peace at common law, *Cantwell* v. *Connecticut*, 310 U. S. 296.

In the *Bridges* case (p. 262) it was said:

> "Moreover the likelihood, however great, that a substantive evil will result, cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantive'. Brandeis, J., concurring in *Whitney* v. *California, supra*, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious', Id., 274 U. S. at page 376, 47 S. Ct. at page 648, 71 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155."

The Court said further that what finally emerges from the "clear and present danger" rule is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished (p. 263). And again, at page 263:

> "Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of

Rights. For the First Amendment does not speak equivocally.

"It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Now contrast this guiding principle with what has been done here. There must be not merely a likelihood that an evil will result, but there must be a clear and present danger that a substantive and serious evil will result. In 1884 Section 1141, Subdivision 2, was enacted. So far as can be ascertained, in the intervening sixty years there has been not a single prosecution based upon it. How, then, can it be supported as preventing a clear and present danger of a substantive and serious evil?

A book was recently issued, edited by one Boucher with a foreword or introduction by Lewis E. Lawes, formerly the Warden of Sing Sing Prison. The book is referred to on its front cover as containing "Classic Accounts of Famous Murders". The first story in the book is of the murder of Cain by Abel. Others relate to famous murders from the 17th Century to the present day—that of La Voicin in 1675; the trial of Eugene Aram in 1745; the murder of Cecilia Rogers; of the Bender Family; of James Maybrick; of Caesar Young; etc. Many of these stories are by authors of high standing: The Earl of Birkenhead, Oscar Wilde, William Bolitho, Alexander Woollcott, etc. It will be said that it is absurd to say that the statute was intended for a book like this or for authors of such standing. Upon no such slender thread, however, may

the statute be supported. It unqualifiedly forbids publication and circulation of books or stories of precisely the nature referred to, and under it, it would be illegal to publish and circulate any criminal reports whatever, however deep and wholesome the public interest may be. In the *Bridges* case certain publishers had commented in their newspapers upon proceedings or prospective proceedings during the trial of a case, and it was said that they were guilty of contempt of court in so publishing. The following comments of the Court have unique applicability here:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

There a restriction upon printed discussion of a pending case was held unlawful because such discussion is constitutionally protected; such a discussion in New York State, if it included a story of the crime involved in such pending case, would be unlawful by statute.

Upon what sort of irregular and disorderly basis are the authors and publishers to proceed under the present status of the law? Here is a statute which makes it illegal to do that which seems innocent enough and which indeed has been done for over sixty years by hundreds of innocent law breakers. Now it is said that they have nothing to fear if the District Attorney does not choose to consider their work within the statute and that really the statute was only intended to apply to works which present tales of crime, etc., in a certain manner. Vagueness in criminal statutes is not to be allowed.

This defendant is directly affected by the statute and is not in the class of the supposititious physician

referred to in *People* v. *Sanger*, 222 N. Y. 192 and *People* v. *Wolf*, 220 App. Div. 71, apparently relied on by the appellee.

We wish to call the attention of this Court to the dissenting opinion of Judge Lehman of the Court of Appeals. He states:

> "The statute, as construed by the Court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech (*Stromberg* v. *California*, 283 U. S. 359)."

It is a fair deduction from the majority opinion of the Court that the publication of any crime book or magazine under the statute would involve risk. The construction of the statute in this case would leave an author or publisher in doubt as to whether a volume or magazine would ultimately be held to be within the meaning of the statute. A penal statute must be sufficiently explicit to inform those subject to it what conduct will render them liable for its penalties.

This Court in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, held:

> "that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common knowledge must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

International Harvester Co. v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634. The Court at pages 392-393 quoted with approval from the case of *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68:

> "* * * 'The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another'."

The affirmance of the conviction was clearly motivated by the condemnation of the books found in the possession of Mr. Winters; but, said the Court, the statute is not aimed at publications dealing with crime news as an incident to the legitimate purposes of science or literature (fol. 166). Then the author and the publisher must, at their peril, determine the limitations of the law. The ordinary crime story or detective story circulates freely and is not disturbed. A little more detail of the crime, the addition of a sentence or two, might make the story lurid and then perhaps would come an indictment. With obscene publications or those advocating anarchy or other

properly condemned publications, it is right that the author or publisher must act at his peril, for there are general standards of morals and decencies of the day which furnish an adequate guide to any honest man. But literature based on public reports or stories of crime have no inherent basis of anything that is wrong or illegal or immoral as the obscene or revolutionary writings would have. No reasonable person ought to be required to delve into the law books to check whether it is unlawful to do what seems so inherently right, and in particular when he is shielded by the protection of constitutional guarantees.

POINT II.

The statute should be declared invalid because of its infringement of constitutional rights.

Respectfully submitted,

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